UNITES STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

In re: Gold King Mine Release in San Juan County, Colorado on August 5, 2015 *This Document Relates to:* *No. 1:18-cv-00319-WJ/LF*	No. 1:18-md-02824-WJ

STATE OF UTAH AND MINING DEFENDANTS' JOINT MOTION AND SUPPORTING BRIEF TO APPROVE AND ENTER PROPOSED CONSENT DECREE

Plaintiff the State of Utah ("Utah") and Defendants Sunnyside Gold Corporation ("SGC"), Kinross Gold Corporation ("KGC"), and Kinross Gold U.S.A., Inc. ("KGUSA") (collectively "Mining Defendants") jointly move the Court to approve and enter the proposed Consent Decree lodged with the Court on March 17, 2021. (*See* MDL ECF 1141-1 at pp. 1-14).[1] This motion is supported by the following brief.

INTRODUCTION

Utah sued the Mining Defendants alleging a release of hazardous substances at the Gold King Mine near Silverton, Colorado on August 5, 2015 ("Blowout"), as well as alleging past and present releases of hazardous substances from nearby mines and mine workings. (*See* MDL ECF 93 at p. 2, ¶¶ 1-3; p. 13, ¶ 73; p. 23, ¶ 132 (filed in MDL Case 1:18-cv-00319-WJ/LF (D. Utah))). Utah's claims against the Mining Defendants include tort claims and

[1] References to "MDL ECF" are to documents as filed and numbered in MDL Case 1:18-md-02824-WJ (D.N.M.) unless specifically noted otherwise in the citation. KGC, KGUSA, and SGC have previously moved for summary judgment in this case, asserting that they are not subject to personal jurisdiction in New Mexico. Those motions are fully briefed and awaiting the Court's decision. By filing this motion, the Mining Defendants are not intending to waive their jurisdictional arguments in general; rather, they are filing this motion and consenting to jurisdiction solely for purposes of effectuating the settlement reached as reflected in the Consent Decree previously filed.

claims under the Comprehensive Environment Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, *et seq.* ("CERCLA"). (*Id.* at pp. 12-20, ¶¶ 64-114). The Mining Defendants, in turn, have asserted counterclaims against Utah under CERCLA for cost recovery and contribution. (MDL ECF 486 at pp. 5-9, ¶¶ 29-62).

Over the past four years, Utah's and the Mining Defendants' respective claims have been the subject of extensive litigation efforts. Experienced counsel have represented Utah and the Mining Defendants, as well as the other parties to this matter, throughout the multi-district litigation. To date, the collective litigation efforts of the parties to the multi-district litigation include over one thousand filings, several million pages of document production, and more than one hundred depositions.

On or about March 4, 2021, Utah and the Mining Defendants entered a Settlement Agreement to fully and finally resolve their claims, avoid the complication and expense of further litigation, and eliminate exposure to liability at trial. (*See* Settlement Agreement pp. 1-10 (Mar. 4, 2021) (attached hereto as Exhibit 1); *see also* MDL ECF 1141-1 at p. 4, § G). The Settlement Agreement was the result of hard-fought adversarial negotiations during a mediation conducted by the Honorable Jay Gandhi, who has a wealth of experience in complex civil litigation and is known for his thorough, insightful, and impartial approach to every matter. During the mediation, Utah and the Mining Defendants substantively negotiated to reach a compromise.

Pursuant to the Settlement Agreement, Utah and the Mining Defendants are required to enter a Consent Decree. (Exhibit 1, Settlement Agreement at pp. 2-3, ¶ 5). With respect to the CERCLA claims, the Consent Decree proposed by Utah and the Mining Defendants requires: (1) the Mining Defendants to pay Utah $1,000,000 (one million dollars) in relation to Utah's

CERCLA claims; (2) Utah to covenant not to sue or to take administrative action against the Mining Defendants for any and all civil claims under CERCLA that were, could now be, or could hereafter be asserted with regard to the events and circumstances described in Utah's First Amended Complaint; and (3) the Mining Defendants to covenant not to sue or to assert any claims or causes of actions against Utah for any and all civil claims under CERCLA that were, could now be, or could hereafter be asserted with regard to the events and circumstances described in Utah's First Amended Complaint and SGC's counterclaims.[2] (MDL ECF 1141-1 at p. 7, ¶¶ 5-7). Public notice of the proposed Consent Decree was given as detailed in the attached Exhibit 3. Despite broad notice, no comments were received regarding the proposed Consent Decree.

The proposed Consent Decree is fair, reasonable, and consistent with CERCLA's goals. In accordance with 42 U.S.C. § 9622(d)(1)(A), Utah and the Mining Defendants respectfully request that the Court approve and enter the proposed Consent Decree.

STANDARD OF REVIEW

CERCLA encourages the use of consent decrees as a means of cleaning-up hazardous waste sites, advancing public interests, and minimizing litigation. *See* 42 U.S.C. § 9622(a) ("Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation."). Before being entered, proposed consent decrees must be reviewed and approved by

[2] The Settlement Agreement also resolves Utah's tort claims against the Mining Defendants, pursuant to a separate payment, but the tort claims are not subject to the Consent Decree. (*See* Exhibit 1, Settlement Agreement at pp. 1-2, ¶¶ 1-2).

the district court with jurisdiction over the CERCLA proceedings. *See* 42 U.S.C. § 9622(d)(1)(A).

The standard of review applied by the district court in reviewing proposed consent decrees is "highly deferential." *U.S. v. Atlas Minerals and Chemicals, Inc.*, 851 F. Supp. 639, 648 (E.D. Pa. 1994). The district court "cannot second-guess the wisdom of the parties' decisions and should preserve their bargained-for positions whenever possible." *Id.* If a proposed consent decree is "fair, reasonable, and consistent with CERCLA's goals," it should be approved and entered by the district court. *See OCentro Espirita v. Board of Cnty. Commrs.*, 2013 WL 12304059, at *2 (D.N.M. 2013) (quoting *U.S. v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)) ("[Consent decrees] must be 'fair, adequate, and reasonable,' and 'not illegal, a product of collusion, or against the public interest'."); *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003) (citing *United States v. Se. Pa. Transp. Auth.*, 235 F.3d 817, 823 (3d Cir. 2000)) ("A court should approve a consent decree if it is fair, reasonable, and consistent with CERCLA's goals."). Proposed consent decrees involving only monetary payments, as in this case, are generally reviewed with less stringency than proposed consent decrees involving response activities. *See New York v. Exxon Corp.*, 697 F. Supp. 677, 691 (S.D.N.Y. 1988); *see also U.S. v. Rohm & Haas Co.*, 721 F. Supp. 666, 685-686 (D.N.J. 1999).

DISCUSSION

1. The proposed Consent Decree is procedurally fair and substantively fair.

The fairness of a proposed consent decree must be evaluated in terms of both procedural and substantive fairness. *U.S. v. Pioneer Nat. Res. Co.*, 452 F. Supp. 3d 1005, 1012 (D. Colo. 2020) (citing *U.S. v. Kerr-McGee Corp.*, 2008 WL 863975, at *5 (D. Colo. 2008) and *U.S. v. Cannons Eng. Corp.*, 899 F.2d 79, 86 (1st Cir. 1990)).

a. The proposed Consent Decree is procedurally fair.

In evaluating the procedural fairness of a proposed consent decree, district courts analyze the parties' settlement negotiations and attempt to measure their candor, openness, and bargaining balance; whether they were conducted forthrightly, in good faith, and at arm's length among experienced counsel; and whether the negotiation process was "full of adversarial vigor." *Pioneer*, 452 F. Supp. 3d at 1012; *Cannons*, 899 F.2d at 86-87; *Tutu Water Wells*, 326 F.3d at 207; *Rohm & Haas Co.*, 721 F. Supp. at 680-681; *U.S. v. Bunn*, 2020 WL 6798939, at *2 (D. Mont. 2020) (citing *U.S. v. Pacific Gas & Elec.*, 776 F. Supp. 2d 1007, 1025 (N.D. Cal. 2011) (quoting *U.S. v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Colo. 1994))). A proposed consent decree can be procedurally fair, even if some parties to the litigation, including potentially responsible parties ("PRPs"), did not participate in the settlement negotiations. *See U.S. v. Cornell-Dubilier Elecs., Inc.*, 2014 WL 4978635, at *5 (D.N.J. 2014) (citing *Cannons*, 899 F.2d at 84 and *U.S. v. Grand Rapids, Mich.*, 166 F. Supp. 2d 1213, 1221 (W.D. Mich. 2000)). "Settlements achieved through extensive arms-length negotiations, and approved by all counsel and the agency charged with implementation of environmental statutes[,] enjoy a strong presumption of validity." *U.S. v. Hardage*, 750 F. Supp. 1460, 1491 (W.D. Okla. 1990), *affd.* 982 F.2d 1436 (10th Cir. 1992).

The proposed Consent Decree between Utah and the Mining Defendants is the result of hard-fought adversarial negotiations during a mediation at which the parties were represented by experienced counsel. The mediation provided Utah and the Mining Defendants with the opportunity to evaluate the strengths and weaknesses of their respective claims. Utah and the Mining Defendants substantively negotiated to reach a compromise during the mediation, including with respect to the proposed Consent Decree. There was no collusion before, during,

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